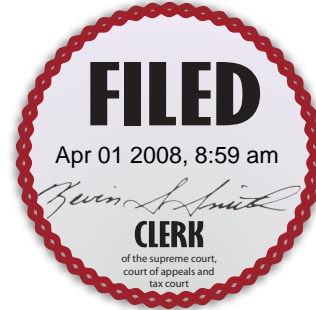


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

OLIVER H. WILLIAMS,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A05-0706-PC-350

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle and
The Honorable William T. Robinette, Master Commissioner
Cause No. 49G03-9609-PC-149602

April 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Oliver H. Williams appeals the denial of his petition to file a belated notice of appeal. Williams raises the following restated issue: Did the trial court properly deny his petition to file a belated notice of appeal?

We affirm.

On September 27, 1996, Williams was charged with robbery as a class B felony. On March 18, 1997, the State sought to add a second count to the charging information alleging that Williams committed battery as a class C felony. On that same day, Williams agreed to plead guilty to the battery charge, and in exchange, the State agreed to dismiss the robbery count. Williams's plea agreement specified that the State would make no recommendation as to the sentence to be imposed. The trial court accepted Williams's guilty plea on May 16, 1997 and sentenced him to eight years with six years suspended and credited him with 232 days served. The court also provided that Williams should be placed on probation for two years.

On June 23, 2002, Williams filed a pro se petition for post-conviction relief alleging that there was an insufficient factual basis to support his guilty plea.¹ Williams filed an amended pro se petition for post-conviction relief on December 4, 2002. In his amended petition, Williams alleged that he was entitled to post-conviction relief for the following reasons: (1) His guilty plea was not knowingly, voluntarily, and intelligently entered into; (2) his due process rights were violated; (3) there was an insufficient factual

¹ At the time Williams filed his petition he was incarcerated. The record does not reveal why Williams was incarcerated. Williams remains incarcerated at this time.

basis to support his guilty plea; and (4) he was denied the effective assistance of trial counsel. On March 24, 2003, Williams filed a second amended petition for post-conviction relief alleging that his conviction should be vacated because there was an improper waiver of jurisdiction by the juvenile court.² Williams filed a motion to withdraw his petition for post-conviction relief on March 26, 2004, and the trial court granted that motion on March 31, 2004.

On April 25, 2007, Williams filed a petition for permission to file a belated notice of appeal of the trial court's May 16, 1997 sentencing order pursuant to Ind. Post-Conviction Rule 2(1). Williams attached an affidavit to his petition. In his petition and affidavit, Williams alleged that the trial court and his defense counsel did not inform him about his right to appeal his sentence, and because of this, he was not at fault for failing to file a timely notice of appeal. Williams further alleged that he had been diligent in requesting permission to file a belated notice of appeal. He stated that he was not aware he had a right to appeal the trial court's May 16, 1997 sentencing order until March 15, 2007, when he learned of our Supreme Court's opinion in *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), which clarified that the proper vehicle for raising a sentencing issue was a direct appeal and not a post-conviction proceeding. Williams alleged that he was unable to learn about the decision in *Collins* sooner because all legal research at the facility where he was incarcerated had to be done by computer and he was "unable to adequately use a computer to do legal research at this time." *Appellant's Appendix* at 82.

² A notation by the trial court in its sentencing order indicates that Williams was only sixteen years old when he pled guilty to the offense in question.

Without holding a hearing, the trial court denied Williams's petition on May 1, 2007 and this appeal ensued.

Williams argues the trial court erred in denying his petition to file a belated notice of appeal. The plea agreement Williams entered with the State was an open plea agreement in that the State made no sentencing recommendation. In such situations where the trial court must exercise sentencing discretion, our Supreme Court has explained that the proper procedure for contesting a trial court's sentencing decision is a direct appeal and not a proceeding under Ind. Post-Conviction Rule 1. *Collins v. State*, 817 N.E.2d 230. When, as here, a defendant fails to file a timely notice of appeal, he may still petition for permission to file a belated appeal under Post-Conviction Rule 2(1).

Id. That rule provides:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

P-C. R. 2(1)(a). P-C. R. 2 also gives a defendant the right to appeal a trial court's denial of permission to file a belated notice of appeal. *Moshenek v. State*, 868 N.E.2d 419 (Ind. 2007).

The decision whether to grant permission to file a belated notice of appeal is within the discretion of the trial court. *Id.* The defendant bears the burden of proving by

a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated notice of appeal. *Id.* “There are no set standards of fault or diligence, and each case turns on its own facts.” *Id.* at 423. Several factors are relevant to the defendant’s diligence and lack of fault in the delay of filing including the defendant’s level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay. *Moshenek v. State*, 868 N.E.2d 419.

A trial court’s ruling on a petition for permission to file a belated notice of appeal under P-C. R. 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination. *Id.* Although we acknowledge that the trial court is generally in a better position to weigh evidence and assess the credibility of witnesses, this is not always the case. *Baysinger v. State*, 835 N.E.2d 223 (Ind. Ct. App. 2005). Where, as here, the trial court does not hold a hearing before denying a petition to file a belated notice of appeal, the only bases for that decision are the allegations made in the petition and any records attached to the petition. *Id.* “Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings.” *Id.* at 224. Thus, we review the denial of Williams’s petition de novo. *See Baysinger v. State*, 835 N.E.2d 223.

In determining whether the trial court abused its discretion when it denied Williams’s petition to file a belated appeal, we are guided by our Supreme Court’s decision in *Moshenek*. In that case, Moshenek pled guilty to murder on January 10, 1989.

At the guilty plea hearing, the trial court told Moshenek that by pleading guilty he gave up his right to appeal his conviction, but made no reference to his right to appeal his sentence. A sentencing hearing was held on January 31, 1989, and the trial court sentenced Moshenek to sixty years. Moshenek filed a pro se petition for post-conviction relief under P-C. R. 1 on January 14, 1994. The petition did not directly challenge his sentence. On February 3, 2005, with the post-conviction proceeding still pending, Moshenek filed a petition for permission to file a belated motion to correct error under P-C. R. 2(2) challenging his sentence. The trial court denied the petition, finding that Moshenek had not been diligent in requesting permission to file a belated motion to correct error. Moshenek appealed and we reversed. *Moshenek v. State*, 851 N.E.2d 339 (Ind. Ct. App. 2006).

On transfer, our Supreme Court affirmed the trial court's denial of Moshenek's petition to file a belated motion to correct error. *Moshenek v. State*, 868 N.E.2d 419. The court initially noted that with regard to the fault element of P-C. R. 2, "[t]he fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal." *Id.* at 424. The court, however, pointed out that even if a defendant proves that he was without fault, he still must establish diligence. *Moshenek v. State*, 868 N.E.2d 419. In considering whether a defendant was diligent in pursuing a belated appeal, the court stated:

Several factors are relevant to this inquiry. Among them are the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties, as, in Moshenek's case, the preparation of transcripts. When the overall time stretches into decades, a belated appeal becomes particularly problematic

because of the risk that significant problems will be encountered in any retrial due to unavailable evidence or witnesses or failing memories.

Id. at 424. The court further pointed out that a P-C. R. 1 sentencing challenge can serve to establish diligence. *Moshenek v. State*, 868 N.E.2d 419. The court noted that although Moshenek did file a P-C. R. 1 petition, he did not attack his sentence. *Id.* The court also found it significant that despite receiving his transcripts in 1991, Moshenek waited three years before he filed his initial petition for post-conviction relief in 1994. *Id.* The court concluded that “[i]t was not clearly erroneous for the trial court to determine that an eleven-year span without any effort to raise a sentencing claim showed lack of diligence in pursuing a belated appeal.” *Id.* at 424.

As in *Moshenek*, Williams alleges in his petition for permission to file a belated notice of appeal and the affidavit that he attached thereto that the trial court did not advise him of his right to appeal his sentence. Williams, though, did not submit the transcript from his guilty plea hearing or his sentencing hearing. Without transcripts of these hearings, we cannot say with certainty that the trial court did not advise Williams of his right to appeal his sentence. Nevertheless, even if we assume that Williams was not advised of his right to appeal his sentence and that because of this he was not at fault for failing to file a timely notice of appeal, he still must establish diligence, which we conclude he has not done.

Here, Williams pled guilty to class C felony battery on March 18, 1997, and the trial court sentenced him on May 16, 1997. Williams waited over five years before he filed his petition for post-conviction relief on June 23, 2002. Williams amended his

petition twice, the first time on December 4, 2002 and again on March 24, 2003. Williams ultimately voluntarily withdrew his petition in March 2004. Williams's petition for post-conviction relief did not challenge his sentence and, thus, does not establish diligence on his part. *See Moshenek v. State*, 868 N.E.2d 419. After dismissing his petition for post-conviction relief, Williams waited over three years to file his petition for permission to file a belated notice of appeal on April 25, 2007. During this period, Williams raised no challenges to his sentence nor did he seek the assistance of counsel to raise such a claim. Williams went almost ten years without making any effort to raise a sentencing claim. This shows a lack of diligence on Williams's part in pursuing a belated appeal. Therefore, the trial court did not abuse its discretion when it denied Williams's petition for permission to file a belated notice of appeal.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.